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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. ~~564~~ 10

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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II. The relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50(e) and 53; and, in holding to the contrary, the Court of Appeals for the Seventh Circuit has in this case decided an important question of federal law which has not, in the recent *Whelchel, Gusik* or other cases been, but should be, authoritatively settled by this Court because of the effect of such a ruling upon the rights and privileges of millions of veterans holding such discharges. 29-34

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No. .....

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

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vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner William H. Giese, hereinafter sometimes called "relator," prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on October 5, 1950, which judgment reversed an order discharging the relator on a writ of habeas corpus, and remanded the case to the District Court with instructions to dismiss the petition, to discharge the writ and to remand the relator to the respondents' custody, without prejudice to his filing a new application for such a writ after exhausting certain administrative remedies under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525).

THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 53-57) is reported at 184 F. 2d 404.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 5, 1950 (R. 58). On December 28, 1950, the time within which this petition could be filed was extended by Mr. Justice Minton of this Court to and including March 3, 1951.

The jurisdiction of this Court is invoked under the provisions of Sections 1254 and 2101 of the Judicial Code, as revised by the Act of June 25, 1948 (28 U. S. C. A. §§ 1254, 2101).

THE QUESTIONS PRESENTED.

1. Whether the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that a certain Army enlisted man "is hereby Honorably Discharged from the military service of the United States" constitutes a "formal, final judgment passed by the Government upon his entire military record", discharges him from all subsisting enlistments and makes him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge.

2. Assuming an affirmative answer to the foregoing,—whether such an individual, subsequently convicted by court-

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martial of an offense (desertion) not so excepted, must, despite his civilian status and before seeking his release on a writ of habeas corpus, first "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53.

3. A third question, reserved for possible argument upon the merits if this petition be granted,—whether the relator, who had reenlisted for 3 years in 1930 and had been involuntarily "restored to duty" in 1942, supposedly under the Extension of Service Act of 1941, was actually subject to Army control at the time of his alleged desertion in 1943.

THE STATUTES INVOLVED.

The various statutes involved are set forth in the Appendix.

SUMMARY STATEMENT.

The relator enlisted in the United States Army in February of 1926 for three years and was discharged upon the termination of such enlistment in February of 1929 (R. 7). In March of 1930, he re-enlisted in the Army for another three years but on July 2 of that year went absent without leave at Fort Snelling, Minnesota (R. 2, 3, 7). In 1935 or 1936, he tendered himself as a deserter to the Sheriff at Bloomington, Illinois, who contacted the F. B. I. or the Army but he was apparently not wanted by them and was released (R. 3, denied R. 7). In July or August of 1942, he was apprehended and returned to military control at Fort Sheridan, Illinois (R. 3, 7, 9). On October 13, 1942, supposedly pursuant to the Extension of Service Act of 1941 (the applicability and effect of which are disputed), he was "restored to duty" and on October 29, 1942, was transferred to Camp White, Oregon, where, on March 15, 1943, he again went absent without leave (R. 7, 9). On March 16, 1944, he was inducted (drafted) into the Army under the same name, William H. Giese (R. 3, 7, 33). After serving 21 months overseas and having been awarded the Good Conduct, Occupation and Victory medals and the European, African and Middle Eastern theatre ribbons with Bronze Battle Star (R. 39-40), he was "honorably discharged from the military service of the United States" on June 29, 1946, at Fort Sheridan, Illinois, for the "convenience of the Government" (Demobilization) as a Sergeant (R. 3, 7, 39-40). In July of 1948, he was arrested by the Criminal Investigation Division of the Army but was granted partial liberty on the condition that he report to them twice a week (R. 3, 6). In February of 1949, he was again arrested and confined in the Guard House at Fort

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Sheridan, Illinois (R. 3, 6). Subsequently (in June and July, 1949) he was tried by a general court-martial convened by the Commanding General of the Fifth Army at Chicago, Illinois, convicted of a desertion alleged to have been committed by him on or about March 15, 1943, and was sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances and to be confined at hard labor for three years (R. 7). Subsequently the respondent Commanding General of the Fifth Army, as the "convening authority" (under Article of War 47, 10 U. S. C. 1518), presumably after referring the case to his staff judge advocate, acted upon the record of his trial and reduced so much of the sentence as pertained to confinement to 10 months and mitigated the "dishonorable discharge" to a "bad conduct discharge" (R. 7).

On December 13, 1949, the relator filed a petition for a writ of habeas corpus in the United States District Court at Chicago, Illinois (R. 2-4). On December 16, 1949 the respondents filed their return to the writ (R. 6-9), a hearing was held (R. 10-38) and the District Court found that the relator was being illegally held and ordered him discharged from the respondents' custody (R. 41), the District Court apparently taking the view that the issuance, "for the convenience of the Government (Demobilization)," on June 29, 1946, of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record," discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge, following the rule laid down in **Ex Parte Drainer**, 65 F. Supp. 410 (1946), affirmed, *per curiam, sub nom* **Gould v. Drainer**, 158 F. 2d 981 (1947). On the Government's

appeal, the Court of Appeals, on October 5, 1950, without reaching the merits, reversed the order discharging the relator and remanded the case to the District Court with instructions to dismiss the petition, to discharge the writ and to remand the relator to the respondents' custody, without prejudice to his filing a new application for a writ after exhausting his administrative remedies under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525) (R. 53-58).

As above indicated, all "administrative" action under Article of War 47 had been completed prior to the hearing in the District Court and, in view of the automatic character of the review provided by Article of War 50 (10 U. S. C. 1521), it must be *presumed* (as is the fact) that the record of trial in this case has long since been reviewed, under subparagraph (e) of said AW 50, by a Board of Review in the office of the Judge Advocate General; that such record of his trial has long since there been held legally sufficient to support the court-martial's findings and sentence; and that the relator's sentence as earlier mitigated (to 10 months' confinement and a bad conduct discharge) has long since there been approved and transmitted to the convening authority (the respondent Chamberlain) for execution (when, as and if the relator is returned to the respondents' custody). Hence, even were they applicable to him as a civilian (which is disputed), the relator has already exhausted any possible "administrative remedies" under Articles of War 47 and 50 (e). In view of the provision of Article of War 53 (10 U. S. C. 1525) that the Judge Advocate General may, under this section, grant a new trial, vacate a sentence, etc., only "*upon application of an accused person,*" it must also be *presumed* (as is the fact) that no such "application" has as yet been made by the relator; and, in view of the further provision of said AW 53 that, as to cases involving offenses

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committed during World War II, such an "application" may be made "within one year after termination of the war" and the further fact that said World War II has not as yet been declared "terminated" by the President, it must also be *presumed* (as is the fact) that if, contrary to our contentions, such provision be held by this Court to be applicable to civilians (viz: individuals given "honorable discharges" prior to their trial by courts-martial), then the time within which he may file such an "application" with the Judge Advocate General has not as yet expired.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the Seventh Circuit erred:

1. In **failing to affirm** the order of the trial court discharging the relator from the custody of the respondents.

2. In **failing to hold** that the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge.

3. In **failing to hold** that the relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53.

4. In **holding** that the relator (despite his contention that he was a civilian, no longer subject to trial by court-martial for a desertion alleged to have been committed prior to his discharge) must, before seeking his release on a writ of habeas corpus, first exhaust such administrative remedies as may be available to military personnel, under Articles of War 47, 50 (e) and 53.

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5. In **reversing** the order discharging the relator on a writ of habeas corpus **and** in **remanding** the case to the District Court **with instructions** to dismiss the relator's petition for a writ of habeas corpus, to discharge said writ and to remand the relator to the custody of the respondents, without prejudice to his right to file a new application for such a writ after exhausting certain indicated administrative remedies under Articles of War 47, 50 (e) and 53.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES" CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

Each of the foregoing reasons for the allowance of the writ is fully developed in the appended brief in support of this petition.

CONCLUSION.

For the foregoing reasons, the petitioner respectfully submits that this case presents a situation of such importance, not only to him as an individual but to the millions of present and future veterans, as to call for the exercise by this Court, in its sound judicial discretion, of its power to review the decision of the court below and he therefore prays that a writ of certiorari to the Court of Appeals for the Seventh Circuit be allowed in this case, and that, on

such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

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BRIEF IN SUPPORT.

In order to avoid unnecessary repetition, the foregoing petition for the writ is hereby by reference incorporated into this supporting brief.

ARGUMENT.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES" CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

This proposition is not a new one.

In **United States ex rel. Santantonio v. Warden,** 265 F. 787 (D. C. E. D. N. Y. 1919), the relator enlisted in the U. S. naval reserve as a chief boatswain's mate in May of 1917 for 4 years. In 1918, while on active duty, he was arrested and confined pending an investigation into charges that he had accepted a bribe, but was restored to duty. In April of 1919 he was released from active duty, placed on the inactive list and given a certificate certifying that he "had performed honorable service" from the time of his enlistment to the date of his release from active service. In November of 1919 he was arrested and held for trial by court-martial on charges of accepting a bribe in 1918.

In *sustaining the writ and discharging the relator, even before trial,* the Court, at pages 789-790, said:

> "The question here presented for answer is: Can an enlisted man in the United States Naval Reserve Forces be tried by a navy court-martial for an offense alleged to have been committed while in active service, and be amenable to a court-martial after he has been released from actual service and entered civil life; no charges or specifications of charges having been preferred against him prior to his release from active service?
>
> * * * * *
>
> **"So the conclusion is imperative that the naval authorities lost jurisdiction of the person of the relator** on January 15, 1919, when he was 'released and restored to duty,' and that if jurisdiction still existed, by virtue of the fact that he was still on active duty, then jurisdiction was completely lost on April 9, 1919, **when he was discharged from active service."** (Emphasis supplied.)

In **United States ex rel. Viscardi v. MacDonald,** 265 F. 695 (D. C. E. D. N. Y., 1920), the relator enlisted in the U. S. naval reserve in 1917 for 4 years and, while on active duty in 1918, was taken into custody for attempting to bribe a chief boatswain's mate unlawfully to transfer a

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seaman from sea to shore duty, but was restored to duty, and served until July of 1919, when he was released from active duty and given a certificate which was equivalent to an honorable discharge, except that in time of war or national emergency he could "be required to perform active service in the navy throughout the war or until the national emergency ceases to exist." Subsequently he was recalled to active duty and held for trial by court-martial for such attempted bribery in 1918.

In *sustaining a writ of habeas corpus, even before trial by court-martial, and in discharging the relator,* the Court, at pages 697-699, said:

> "The Attorney General, in an exhaustive opinion dated July 10, 1919, has held that **a person discharged from the** naval **service,** either in the United States navy or the United States naval reserve force, **cannot be brought to trial before a** naval **general court-martial,** or otherwise punished, **for an offense (committed during active service) after he has been discharged** from the navy or released **from active duty** therein and within two years after the date of the commission of such offense. All decided cases, so far as known, are recited in this opinion.
>
> * * * * *
>
> "In two cases recently decided in this district the relator was subject to trial by court-martial during the time within which he was still on active duty, and after being freed from preliminary arrest pending inquiry; but no such court-martial was instituted until after release from active duty with the navy.
>
> "In the case of *United States ex rel. Santantonio* v. *Warden or Keeper of Naval Prison,* 265 Fed. 787, the relator obtained by habeas corpus his release from court-martial at the hands of the navy for an offense alleged to have been committed during active service. The court held his release from active service equivalent, so far as the charges of misconduct were concerned, to an honorable discharge before arrest on court-martial. The arrest of the relator occurred

within the four-year period for which he had enlisted as a member of the volunteer naval reserve; but he had not been recalled into active duty, and was in effect a civilian subject to recall into active service only 'in time of war or national emergency.' Decision by Thomas, J., November 26, 1919.

"In the case of *United States ex rel. Goodrich* v. *MacDonald*, no written opinion (decision by Manton, C. J., sitting in the District Court, February 25, 1920), the relator was discharged because he had been released from active duty in the navy, with a certificate equivalent in these respects to an honorable discharge, prior to the time when an attempt was made to recall him into active service, for the purpose of trial by court-martial, and then to place him on trial as if no discharge had been granted.

* * * * *

"These decisions in effect hold that the release from active duty is equivalent to an honorable discharge, after which a man cannot be recalled into service, except upon the intervention of some actual continuation of service in time of war or of national emergency. They also hold, in accordance with the opinion of the Attorney General, *supra*, that after such release a member of the naval reserve force cannot be brought to trial by court-martial for an offense alleged to have been committed prior to his release. They also hold that the charge for which the relator, Viscardi, is now held on court-martial, is not within the provisions of chapter 67 of the Laws of 1863 (12 Stat. 696), entitled 'An act to prevent and punish frauds upon the government of the United States,' by section 2 of which law it is enacted:

> " 'That any person heretofore called or hereafter to be called into or employed in such forces or service, who shall commit any violation of this act and shall afterwards receive his discharge, or be dismissed from the service, shall, notwithstanding such discharge or dismissal, continue to be liable to be arrested and held for trial and sen-

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tence by a court-martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.'

"Giving full effect to these decisions, therefore, and recognizing the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces, the present writ of habeas corpus should be sustained, and the relator discharged." (Emphasis supplied.)

In **Ex parte Wilson**, 33 F. 2d 215 (1929), an ensign in the U. S. Navy went absent without leave on October 13, 1927 and, on January 26, 1928, on the recommendation of the Secretary of the Navy, the President directed that he "be dropped from the rolls of the Navy." On February 18, 1929, he was apprehended and held for court-martial for desertion. In *discharging the relator from custody, even before his court-martial*, Judge Groner, at page 215, said:

"It was stated at bar that the precise question here involved has never been judicially determined. On the other hand, **it has been uniformly and consistently held by the administrative officers of the Army and Navy that a person separated from either service thereafter ceases to be amenable to military jurisdiction**, and this practice has been approved by separate opinions of five Attorneys General—Toucey (5 Op. Attys. Gen. 55), Cushing (8 Op. Attys. Gen. 328), Knox (24 Op. Attys. Gen. 570), and Palmer (31 Op. Attys. Gen. 520).

"These opinions are largely based upon the recognition of the fact that a court martial under the laws of the United States is a court of special and limited jurisdiction. It has no jurisdiction beyond that given it by statute, and, since there is no statute giving it jurisdiction over persons not in the military service, it may not assume such jurisdiction either as a matter of convenience or public policy.

* * * * *

"* * * Under such circumstances, to say that, though he is dropped, he is not dismissed, is a play on words, but, whether dropped or dismissed, he is out of the service, and his place filled by another, and **the person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil courts for relief from arrest and trial by a Navy court-martial.**" (Emphasis supplied.)

As is pointed out in our Summary Statement (*ante*, pp. 5-6), the District Court found that the relator was being illegally held and ordered him discharged from the respondents' custody (R. 41), the District Court apparently taking the view that the issuance, "for the convenience of the Government (Demobilization)", on June 29, 1946, of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) allegedly committed prior to such discharge, following the rule laid down in **Ex Parte Drainer**, 65 F. Supp. 410 (1946), affirmed, *per curiam, sub nom* **Gould v. Drainer**, 158 F. (2d) 981 (1947).

In the cited case, which, after changing "Drainer" to "Giese" and "Navy" to "Army", seems to be on all fours with the case at bar, the relator enlisted in the U. S. Marine Corps (which is not a separate branch of service but is a part of the U. S. Navy and subject to its laws and regulations) in August of 1940 for four years. A month later he absented himself without leave and was declared a deserter. In July of 1943 he enlisted in the U. S. Navy under the same name but did not disclose his prior service.

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After serving a year and a half, eight months of it overseas, he was given an "honorable medical discharge" by the Navy in November of 1944. In November of 1945 he was apprehended, returned to a Navy base, tried and found guilty of a desertion alleged to have been committed on September 8, 1940 and was sentenced to be dishonorably discharged and to be confined at hard labor for eighteen months.

In *granting the petition for a writ of habeas corpus and in discharging the relator*, Judge Roche, at pages 411-412 (of 65 F. Supp.), said:

> "* * * In so enlisting, he gave his true name and address but gave his age as 17, in order to avoid the problem of not having a draft registration card, and failed to disclose his prior military service. **While this might constitute a fraudulent enlistment, it was no part of the specification on which the petitioner was tried.**
>
> * * * * *
>
> **"The question is whether a civilian, regularly separated from the service, can be tried by Court Martial for a desertion committed prior to the receipt of an Honorable Discharge.**
>
> **"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service.** *United States* v. *McDonald*, 265 F. 695; Naval Courts and Boards, Section 334 at page 92; Winthrop, Military Law and Precedents, 2nd Ed. (1920) at page 89. **And once honorably discharged, such Honorable Discharge is a 'formal final judgment passed by the government upon the entire military record' of the person. United States v. Kelly**, 15 Wall. 34, 82 U. S. 34, 36, 21 L. Ed. 106." (Emphasis supplied.)

As pointed out above, Judge Roche's said order was *affirmed per curiam sub nom* **Gould v. Drainer**, 158 F.

2d 981, by the Ninth Circuit in 1947, and was expressly cited and followed by the District Court in deciding the case at bar (R. 37).

The *Drainer* case has since been cited with approval in **United States ex rel. Pasela v. Fenno**, 76 F. Supp. 203 (1947), affirmed, 167 F. 2d 593, cer. allowed, 334 U. S. 857, cer. dismissed, 335 U. S. 806, where the District Court, in holding a Navy Fleet Reservist subject to court-martial on charges growing out of his thefts of Naval property, at page 205, said:

> "The Courts have held that one discharged from the services, including the Navy, as well as a reservist of the Army returned to inactive status, is not ordinarily subject to recall to active duty for trial for offenses committed, but not prosecuted, during the prior active service.[2] It would appear that such a recall has been provided for, however, in cases of fraud,[3] and in recent years for all offenses committed by Naval Reservists."

Another example of a proper application of Article of War 94 (10 U. S. C. 1566) is **Kronberg v. White**, 84 F. Supp. 392 (1949), where, in a suit by the guardian of a minor against certain Army officers for his ward's allegedly false arrest and imprisonment, the Court dismissed the suit on the ground that an honorably discharged veteran could legally be arrested and tried by court-martial for the theft of some $700 worth of Government property under said Article of War 94 which expressly provides for such action

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"2 *United States ex rel. Hirschberger* v. *Malanaphy*, D.C.E.D. N.Y., 1947, 73 F. Supp. 990; *Durant* v. *Hironimus*, D.C.W.Va., 1947, 73 F. Supp. 79; *United States ex rel. Viscondi* v. *MacDonald*, D.C.E.D.N.Y., 1920, 265 F. 695; *United States ex rel. Santantonio* v. *Warden*, D.C.E.D.N.Y. 1919, 265 F. 787; *Ex parte Drainer*, D.C.N.D.Cal., 1946, 65 F. Supp. 410, affirmed 9 Cir. 1947, 158 F. 2d 981; *Ex parte Wilson*, D.C.E.D.Va., 1929, 33 F. 2d 214.

"3 34 U.S.C.A. § 1200, Art. 14, par. 11."

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in cases of specified frauds against the Government, the Court, at 394, saying:

> "Jurisdiction is the critical issue and its depends, in the first instance, on the constitutionality of Article 94. It is undisputed that plaintiff had served in the Army, had been honorably discharged, and was a civilian at the time of his arrest. It is further undisputed that he was not subjected to military arrest and imprisonment until after investigation had disclosed a substantial quantity of Government property in his possession, together with letters indicating strongly that such property had been either illegally obtained while he was in the service or illegally retained after his discharge. He therefore came squarely within the provision of Article 94 that makes the discharged soldier who is guilty of defrauding the Government liable to military arrest and court-martial in the same manner and to the same extent as if he had not been separated from the service. * * *"

It should especially be noted that, in the case now at bar, the relator was *not* charged with any violation of Article of War 94 (10 U. S. C. 1566) but was charged only with desertion under Article of War 58 (10 U. S. C. 1530), which is *not* one of the pecuniary frauds against the Government specifically enumerated under said Article of War 94 which expressly provides that a person so defrauding the Government (which is not even charged here)

> "shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so separated therefrom."

The *Drainer* case has also been cited with approval in **Hironimus v. Durant**, 168 F. 2d 288 (C. C. A. 4th, 1948, Cer. den. 335 U. S. 818), where (in holding that a WAC Captain who had been issued orders putting her on "ter-

minal leave," upon the expiration of which she would be relieved from active duty, although her commission would continue in force "during the period of the present emergency plus 6 months unless sooner terminated," which orders were terminated and revoked *before* her "terminal leave" had expired, could legally be ordered back to active duty and tried by court-martial for larceny committed during her service) the Court of Appeals for the Fourth Circuit, at page 293, said:

> "* * * **Thus it has been held that a person discharged from the Navy or the Army before the commencement of a court-martial prosecution against him cannot thereafter be brought to trial before the court-martial for crimes committed while he was in active service except as to certain offenses for which the statute makes express provision**; and it has also been held that an officer in inactive status cannot be restored to active duty so as to subject him to such prosecution. 31 Op. Atty. General 521; Manual for Courts-Martial, United States Army, p. 8, par. 10; 4 JAG Bull. 35, 1946; *United States* v. *MacDonald*, D. C. E. D. N. Y., 265 F. 695; *United States* v. *Warden*, D. C. E. D. N. Y., 265 F. 787; *Ex parte Wilson*, D. C. E. D. Va., 33 F. 2d 214; *Ex parte Drainer*, D. C. N. D. Cal., 65 F. Supp. 410, affirmed *Gould* v. *Drainer*, 9 Cir., 158 F. 2d 981. Cf. *United States* v. *Malanaphy*, D. C. E. D. N. Y., 73 F. Supp. 990, reversed April 9, 1948, 2 Cir., 168 F. 2d 503." (Emphasis supplied.)

The *Drainer* case has also been cited with approval by the Court of Appeals for the Second Circuit in **United States ex rel. Hirshberg v. Malanaphy**, 168 F. 2d 503 (1948), reversed (on other grounds) *sub nom.* **United States ex rel. Hirshberg v. Cooke**, 336 U. S. 210, 69 S. Ct. 530 (1949). In that case the relator in March of 1946 was given an honorable discharge from the Navy but, the next day, reenlisted, obligating himself to serve another four years

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"subject to such laws, regulations and articles for the government of the Navy as are or shall be established by the Congress * * * or other competent authority * * *." A year later he was charged with mistreating other Naval enlisted men while a Japanese prisoner of war, convicted by a court-martial and sentenced to ten months confinement and to be dishonorably discharged from the Navy. He then sought his release on a writ of habeas corpus on the ground that the court-martial judgment was void for want of statutory power to convict him for an offense committed, if at all, during his prior enlistment, and the District Court sustained his contention and released him from custody. 73 F. Supp. 990. The Court of Appeals for the Second Circuit, one Judge dissenting, reversed, 168 F. 2d 503, on the ground that, under Naval Regulation 334 issued by the Secretary of the Navy and approved by the President and under the relator's reenlistment contract above quoted, the Navy had jurisdiction to try him while on duty despite his prior "honorable discharge" but, at page 505, conceded that:

> "* * * **It has long been the rule that a member of the Navy or the Army who has received an honorable discharge from service and has been returned to civilian life cannot be tried by court-martial for offenses committed during his enlistment, excepting such offenses as are specifically withdrawn from the general rule by Article 14** of the Articles for the Government of the Navy, 34 U. S. C. A. § 1200, Art. 14 **or Article 94 of the Articles of War**, 10 U. S. C. A. § 1566, Art. 94.[2]. **The offenses of which the relator was convicted were not of those specified in Article 14.** And a subsequent enlistment, no matter how soon after the discharges,

"2 See *Ex parte Wilson*, D.C.E.D.Va., 33 F. 2d 214; *Ex parte Drainer*, D.C.N.D.Cal., 65 F. Supp. 410, 411, affirmed *sub nom Gould* v. *Drainer*, 9 Cir., 158 F. 2d 981; *United States ex rel. Viscardi* v. *MacDonald*, D.C.E.D.N.Y., 265 F. 695, 697; *Durant* v. *Hironimus*, D.C.S.D.W.Va., 73 F. Supp. 79, 85."

does not revive the last jurisdiction. See Winthrop, Military Law and Precedents, 1920 ed., 93; CMO 22-1917, page 7; CMO 12-1921, page 11; CMO 1-1926, page 9; CMO 12-1929, page 7. These rulings would be conclusive against the jurisdiction of the court-martial in the case at bar, were it not for section 334, Naval Courts and Boards. * * *" (Emphasis supplied.)

On certiorari, this Court, in 336 U. S. 210, 69 S. Ct. 530 (1949), *reversed* and, speaking through Mr. Justice Black, at pages 214-219, said:

"While not itself determinative of the question here, 34 U. S. C. § 1200, art. 14 (Eleventh), 34 U. S. C. A. § 1200, art 14, subd. 11, has greatly influenced the Army and Navy in determining their court-martial jurisdiction to try service personnel for offenses committed in prior enlistments. That Article provides that where any person previously discharged or dismissed from the Navy has 'while in the naval service' been guilty of certain types of fraud against the Government, such person 'shall continue to be liable, to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.'

"Article 14 (Eleventh) stems from an Act of Congress passed in 1863, particularly designed to punish frauds against the military branches of the Government in connection with the procurement of supplies for war activities. 12 Stat. 696. That the attention of the 1863 Congress was directly focused upon the powers that could and should be vested in courts-martial is made clear by the debates and by the fact that Congress deleted from the bill as proposed specific provisions which would have made civilian government contractors subject to trial before military and naval courts-martial. Cong. Globe, 37th Cong., 3d Sess. 952-958 (1863), and Part II, Appendix to Cong. Globe, 3d Sess. 199 (1863). See *Ex parte Hen-*

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derson, C. C. D. Ky. 1878, 11 Fed. Cas. 1067, No. 6,349. And see *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 539-545, 63 S. Ct. 379, 382-385, 87 L. Ed. 443. But after elimination of certain provisions which would further have expanded court-martial jurisdiction, Congress left in the bill § 3, now Naval Article 14 (Eleventh), which makes naval personnel guilty of service frauds subject to court-martial after discharge or dismissal. The same 1863 provision has also been made applicable to Army personnel by Article of War 94, 10 U. S. C. § 1566, 10 U. S. C. A. § 1566.

"**Congress in this 1863 Act plainly recognized that there was a significant difference between court-martial power to try men in the service and to try former service men after their discharge.** The Government correctly argues that the attention of the 1863 Congress was not focused on the precise question here, namely, the extent of a military court's statutory power to punish a man presently 'in the service' for an offense committed in a prior enlistment period from which he has been discharged. **But the fact remains that the 1863 Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service. Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there defined—frauds against the Government. Since the 1863 Act, Congress has not passed any measure that directly expanded court-martial powers over discharged servicemen, whether they re-enlisted or not.**

"Obviously Article 8 (Second), which subjects to court-martial jurisdiction persons 'in the Navy', supports an argument that petitioner was subject to trial by this court-martial. It is equally obvious that the language of Article 8 (Second) particularly in view of Article 14 (Eleventh) supports an argument that this court-martial could not try petitioner for an offense committed prior to his honorable discharge. Under

these circumstances the manner in which court-martial jurisdiction has long been exercised by the Army and Navy is entitled to great weight in interpreting the Articles.

"The question of the jurisdiction of a naval court-martial over discharged personnel was submitted by the Secretary of the Navy to the Attorney General in 1919. The precise question of whether re-enlistment could revive jurisdiction of a military court was not considered, but as to the power of military courts over discharged personnel in general the **Attorney General reached the conclusion that a person discharged from the Navy before proceedings were instituted against him 'for violations of the Articles Governing the Navy, excepting Article 14' could not 'thereafter be brought to trial * * * for such violations, though committed while he was in the service.'** 31 Op. Atty. Gen. 521, 529. **This conclusion of the Attorney General relied on statements of the Judge Advocate Generals of the Army and Navy that their offices had 'from the beginning and uniformly held that a person separated from service ceases to be amenable' to military and naval jurisdiction.** Previous to the Attorney General's 1919 opinion neither the Navy nor Army had ever claimed court-martial power to try their personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before discharge. See Winthrop, Military Law and Precedents, 93 (2d ed. 1920). **The Government concedes that the Army has always so construed its court-martial jurisdiction whenever the question arose.** And the Government concedes that the Navy also followed this view of its jurisdiction until 1932. Many holdings and opinions of Army and Navy authorities are cited to support these concessions. The Government's brief quotes the following language by the Navy Department in one of the cases which considered the precise issue raised here. The case appears in CMO 12-1921, p. 11.

"'**Except in cases of offenses in violation of Article 14 of the Articles for the Government of**

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the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted.'

"Accepting as we do the longstanding Army and Navy interpretation of the Articles previously referred to, an interpretation which necessarily would deny jurisdiction to the court-martial here, there remains the contention that the Navy has, by a recent congressionally authorized regulation acquired such jurisdiction for its courts-martial. 34 U. S. C. § 591, 34 U. S. C. A. § 591, authorized the Secretary of the Navy, with the approval of the President, to adopt and alter regulations and orders for control of the Navy. The Government claims that a regulation adopted pursuant to this authority has been promulgated, and that it vested the necessary power in this court-martial to try petitioner. This authorized regulation, it is contended, had the force of law, *Ex parte Reed*, 100 U. S. 13, 22, 25 L. Ed. 538, and consequently supplants the prior statutes which, as interpreted, had denied the jurisdiction here asserted. There has been considerable argument as to whether the language of the Navy regulation was sufficiently precise to endow it with the force of law. Passing over this argument, however, we are not able to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U. S. C. § 591, 34 U. S. C. A. § 591, as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. *United States* v. *Symonds*, 120 U. S. 46, 50, 49, 7 S. Ct. 411, 412, 413, 30 L. Ed. 557.

"The regulation stands no better if it be considered merely as an evidence of a revised naval interpretation of the Article. This revised naval interpretation was

given in 1932. **Before that time, both Army and Navy had for more than half a century acted on the implicit assumption that discharged service men, whether re-enlisted or not, were no longer subject to court-martial power. The Attorney General of the United States had proceeded on the same assumption. And see United States v. Kelly,** 15 Wall. 34, 36, 21 L. Ed. 106. Under these circumstances, little weight can be given to the 1932 separate effort of the Navy to change the long-accepted understanding of its statutory court-martial power. For should this belated naval interpretation of its statutory court-martial powers be accepted as correct, there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. **We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces."** (Emphasis supplied.)

In view of the foregoing, we respectfully submit (1) that the issuance, "for the convenience of the Government (Demobilization)", of a discharge certifying that the relator "is hereby Honorably Discharged from the military service of the United States" constituted a "formal, final judgment passed by the Government upon his entire military record", discharged him from all subsisting enlistments and made him a civilian, no longer subject to trial by court-martial for any offense (except frauds specified under Article of War 94) committed prior to such discharge; and (2) that, in failing to so hold, the decision of the Court of Appeals for the Seventh Circuit in this case is not only in conflict

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with the decision of the Ninth Circuit in the *Drainer* case but will, unless reversed by this Court, cause greatest concern on the part of millions of veterans holding such discharges.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

In the **Santantonio** (265 F. 287), **Viscardi** (265 F. 695) and **Wilson** (33 F. 2d 695) cases, heretofore discussed in detail under Point I (*ante*, pp. 14-18), the courts have held that (except for those pecuniary frauds against the Government specifically enumerated under Article of War 94) the effect of the issuance of an "honorable discharge" to a serviceman is to transform him into a "civilian", no longer subject to trial by courts-martial; and, as a result,

in each of said three cases, the court discharged the relator from custody on a writ of habeas corpus, not only *without* requiring him first to exhaust any post conviction "administrative remedies" but *without* requiring him even to stand trial before a court-martial, the court in the *second* **(Viscardi)** case expressly

> "recognizing the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and the court in the *third* **(Wilson)** case expressly holding that

> "the person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil courts for relief from arrest and trial by a * * * court-martial".

Furthermore, in the **Hirshberg** (336 U. S. 210) case, also discussed in detail under Point I (*ante*, pp. 22-28), this Court, in *reversing* the Second Circuit and in thus *discharging* the relator, who had received an "honorable discharge" prior to his trial by court-martial, likewise did *not* require the relator (as such a civilian) first to exhaust any post conviction "administrative remedies" before seeking his release on a writ of habeas corpus.

As your Honors well know, this Court has recently (December 4, 1950) decided **two** cases **(Whelchel v. McDonald**; and **Gusik v. Schilder)** dealing with this general subject matter but *neither* of those cases involved a veteran who had received an "honorable discharge" prior to his trial by court-martial; and in *neither* of said cases did this Court pass upon or even discuss the precise issue now raised by the instant petition for a writ of certiorari.

In the **first** of these two cases, **Whelchel v. McDonald**, No. 109 of this Term, 340 U. S. ____, 71 S. Ct. 146, the

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relator, while on active duty with the United States Army in Germany, was convicted of rape upon a German girl and was given a (mitigated) sentence to ten years confinement. He sought his release on a writ of habeas corpus on the grounds: (1) that question of his sanity was not properly determined; (2) that the law member of a court-martial was not named from the Judge Advocate General's Department; and (3) that there was no enlisted men on the court-martial. The District Court denied the petition and the Fifth Circuit, after holding the case while the relator applied unsuccessfully for a new trial under Article of War 53, affirmed (176 F. 2d 260; 178 F. 2d 760). Although the Court of Appeals pointed out that, at the time of its original opinion (176 F. 2d 260), the relator had not exhausted his administrative remedies by seeking a new trial under Article of War 53, this Court, after noting that such an application had been made *before* the case *left* the Court of Appeals, affirmed but did *not* further discuss the question.

In the **second** of these two cases, **Gusik v. Schilder**, No. 110 of this Term, 340 U. S. ____, 71 S. Ct. 149, the relator, while on active duty with the United States Army in Italy, was tried by a general court-martial and convicted of murder. After exhausting such administrative remedies as were available under the Articles of War as they then existed, he sought his release on a writ of habeas corpus on the grounds: (1) that no thorough and impartial pre-trial investigation had been made; (2) that the Trial Judge Advocate had failed to call material witnesses; and (3) that he had been denied the assistance of effective counsel. The trial court sustained the writ and discharged the relator but the Sixth Circuit, *sub nom.* **Schilder v. Gusik** (180 F. 2d 662), without reaching the merits, reversed and remanded the case with instructions to dismiss the petition (without prejudice to a subsequent petition) on the ground that the relator had not applied to the Judge Advocate General for

a new trial under Article of War 53 (which had become effective *after* the trial court's order). In *reversing* and *remanding* the case to the Sixth Circuit for further proceedings, this Court, speaking through Mr. Justice Douglas, at pages 151-153, said:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition of habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. That is not only the holding of the Court in a long line of cases (see *Mooney* v. *Holohan*, 294 U. S. 105, 115; *Ex Parte Hawk*, 321 U. S. 114, 116); it is the rule which Congress recently wrote into the Judicial Code, 28 U. S. C. § 2254. The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is as well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created, as indeed is implicit in cases from a state court whose review we denied pending exhaustion of a newly created state remedy. See *Walker* v. *Ragen*, 338 U. S. 833; *Marks* v. *Ragen*, 339 U. S. 926. Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

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"Trial of the case in the District Court had ended before the effective date of Article 53 and the question of the exhaustion of the new remedy which the Article affords was not raised until the case was in the Court of Appeals. We conclude that in the interests of justice the Court of Appeals, instead of reversing the District Court and ordering the petition to be dismissed, should have done what the Court of Appeals in *Whelchel* v. *McDonald*, 340 U. S. ....., 71 S. Ct. 146, did under like circumstances and held the case pending resort to the new remedy under Article 53. * * *".

Although there are many cases in the various Courts of Appeal and District Courts which, following the rule laid down by the Fifth Circuit in the said case of **Whelchel v. McDonald**, 176 F. 2d 260, have refused writs of habeas corpus sought by persons under sentence by Army courts-martial until after the relator has first applied to the Judge Advocate General for a new trial under Article of War 53 (see **Spencer v. Hunter**, 177 F. 2d 370; **McMahon v. Hunter**, 179 F. 2d 661, cer. den., 339 U. S. 968; **Simmons v. Hunter**, 179 F. 2d 664, cer. den., 339 U. S. 968; **Hiatt v. Burchfield**, 179 F. 2d 679, cer. den., 339 U. S. 987; **Hiatt v. Fugate**, 179 F. 2d 679; **Hiatt v. Jackson**, 179 F. 2d 680, cer. den., 339 U. S. 968; **Reck v. Hunter**, 179 F. 2d 784; **Dickens v. Hunter**, 179 F. 2d 784; **Massey v. Humphreys**, 85 F. Supp. 534; **Sinclair v. Hiatt**, 86 F. Supp. 828; **Olsen v. Hiatt**, 89 F. Supp. 174; **Cochrane v. Zuppmann**, 89 F. Supp. 329; **Sweeney v. Hiatt**, 89 F. Supp. 416; and **Williams v. Humphrey**, 89 F. Supp. 538), *none* of these cases involved an individual who had received an "honorable discharge" prior to his trial by court-martial and, so far as we are presently advised, *no* case, other than the case at bar, has as yet been adjudicated involving the effect of such a discharge upon the question of whether such a civilian (viz.: one "honorably discharged" *before* his trial by court-martial) must, before seeking his release by way of habeas corpus,

first apply to the Judge Advocate General for a new trial under Article of War 53.

As pointed out in our Summary Statement (*ante*, pp. 5-7), even were this Court (contrary to our position) to hold that such a civilian must nevertheless first exhaust such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53 (10 U. S. C. 1518, 1521, 1525), the relator's "remedy" under Article of War 47 had been "exhausted" *before* the hearing in the District Court; his "remedy" under Article of War 50 (e) has also long since been "exhausted"; and the only such "remedy" still possibly open to him is an "application" to the Judge Advocate General for a "new trial", etc. under Article of War 53.

In view of the foregoing, we respectfully submit (1) that the relator, after his subsequent conviction by court-martial of an offense (desertion) not so excepted, by virtue of his civilian status was not required, before seeking his release on a writ of habeas corpus, first to "exhaust" such "administrative remedies" as may be available to military personnel under Articles of War 47, 50 (e) and 53; and (2) that, in holding to the contrary, the Court of Appeals for the Seventh Circuit has in this case decided an important question of federal law which has not, in the recent **Whelchel**, **Gusik** or other cases been, but should be, authoritatively settled by this Court because of the effect of such a ruling upon the rights and privileges of millions of veterans holding such discharges.

Respectfully submitted,

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APPENDIX.

10 U. S. C. A. 1518 (Article of War 47) provides:

§1518. Action by convening authority (article 47)—Assignment of judge advocates; channels of communication

* * * * *

Action on record of trial

(c) Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

Approval

(d) No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: *Provided*, That no sentence of a special court-martial including a bad-conduct discharge shall be carried into execution until in addition to the approval of the convening authority the same shall have been approved by an officer authorized to appoint a general court-martial.

Who may exercise

(e) Action by the convening authority may be taken by an officer commanding for the time being, by a successor in command, or by any officer exercising general court-martial jurisdiction.

Powers incident to power to approve

(f) The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52. As amended June 24, 1948, c. 625, Title II, § 223, 62 Stat. 634.

10 U. S. C. A. 1521 (Article of War 50) provides:

§1521. Appellate review (article 50)—Board of review; judicial council

(a) The Judge Advocate General shall constitute, in his office, a Board of Review composed of not less than three officers of the Judge Advocate General's Department. He shall also constitute, in his office, a Judicial Council composed of three general officers of the Judge Advocate General's Department: *Provided*, That the Judge Advocate General may, under exigent circumstances, detail as members of the Judicial Council, for periods not in excess of sixty days, officers of the Judge Advocate General's Department of grades below that of general officer.

Additional boards of review and judicial councils

(b) Whenever necessary, the Judge Advocate General may constitute two or more Boards of Review and Judicial Councils in his office, with equal powers and duties, composed as provided in the first paragraph of this article.

Branch offices

(c) Whenever the President deems such action necessary, he may direct The Judge Advocate General to establish a branch office, under an Assistant Judge Advocate General who shall be a general officer

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of the Judge Advocate General's Department, with any distant command, and to establish in such branch office one or more Boards of Review and Judicial Councils composed as provided in the first paragraph of this article. Such Assistant Judge Advocate General and such Board of Review and Judicial Council shall be empowered to perform for that command under the general supervision of The Judge Advocate General, the duties which the Judge Advocate General and the Board of Review and Judicial Council in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President: *Provided*, That the power of mitigation and remission shall not be exercised by such Assistant Judge Advocate General or by agencies in his office, but any case in which such action is deemed desirable shall be forwarded to The Judge Advocate General with appropriate recommendations.

Action by board of review when approval by President or confirming action is required

(d) Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Judicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of

legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

(3) When the Board of Review is of the opinion that the record of trial in any case requiring confirming action by the President or confirming action by the Judicial Council is legally insufficient to support the findings of guilty and sentence, or the sentence, or that errors of law have been committed injuriously affecting the substantial rights of the accused, it shall submit its holding to the Judge Advocate General and when the Judge Advocate General concurs in such holding, such findings and sentence shall thereby be vacated in accord with such holding and the record shall be transmitted by the Judge Advocate General to the appropriate convening authority for a rehearing or such other action as may be proper.

(4) In any case requiring confirming action by the President or confirming action by the Judicial Council in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, or the sentence, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action or for other appropriate action in a case in which confirming of the sentence by the President is required under article 48a.

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Action by board of review in cases involving dishonorable or bad-conduct charges or confinement in penitentiary.

(e) No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, other than records of trial examination of which is required by paragraph d of this article, shall be examined by the Board of Review which shall take action as follows:

(1) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, and confirming action is not by the Judge Advocate General or the Board of Review deemed necessary, the Judge Advocate General shall transmit the holding to the convening authority, and such holding shall be deemed final and conclusive.

(2) In any case in which the Board of Review holds the record of trial legally sufficient to support the findings of guilty and sentence, but modification of the findings of guilty or the sentence is by the Judge Advocate General or the Board of Review deemed necessary to the ends of justice, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

(3) In any case in which the Board of Review, holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General concurs in such holding, the findings and sentence shall thereby

be vacated in whole or in part in accord with such holding, and the record shall be transmitted by the Judge Advocate General to the convening authority for rehearing or such other action as may be appropriate.

(4) In any case in which the Board of Review holds the record of trial legally insufficient to support the findings of guilty and sentence, in whole or in part, and the Judge Advocate General shall not concur in the holding of the Board of Review, the holding and the record of trial shall be transmitted to the Judicial Council for confirming action.

Appellate action in other cases

(f) Every record of trial by general court-martial the appellate review of which is not otherwise provided for by this article shall be examined in the Office of the Judge Advocate General and if found legally insufficient to support the findings of guilty and sentence, in whole or in part, shall be transmitted to the Board of Review for appropriate action in accord with paragraph e of this article.

Weighing evidence

(g) In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact.

Finality of court-martial judgments

(h) The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursu-

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ant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53. As amended June 24, 1948, c. 625, Title II, § 226, 62 Stat. 635.

10 U. S. C. A. 1525 (Article of War 53) provides:

§1525. Petition for new trial (article 53)

Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49 and 50, and all dismissals, and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of

the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States. As amended July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; June 24, 1948, c. 625, Title II, § 230, 62 Stat. 639.

10 U. S. C. A. 1566 (Article of War 94) provides:

§1566. Frauds against the Government (article 94)

Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature

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upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipment, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof: *Provided*, That any person, subject to military law, who commits larceny or embezzlement with respect to property of the United States, furnished or intended for the military service thereof, or with respect to other property within the purview of this article, steals said property within the meaning of this article; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same; or

Who enters into any agreement or conspires to commit any of the offenses aforesaid;

Shall, on conviction thereof, be punished by fine or

imprisonment, or by such other punishment as a court martial may adjudge, or by any or all of said penalties. If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom. As amended June 24, 1948, c. 625, Title II, § 237, 62 Stat. 640.

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